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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 81 6353

HERBERT RUSSELL BASSETT,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, Herbert Russell Bassett, petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia which had affirmed a capital murder conviction and a sentence of death.

OPINION BELOW

The Virginia Supreme Court opinion affirming petitioner's conviction is reported at Va. , S.E.2d. (1981) (and a copy of it is appended hereto)

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

A. Whether the Virginia Capital Murder statute, §19.2-264-2, is unconstitutional in that it violates the 8th and 14th Amendments of the United States Constitution and Article I, Section 9 of the Virginia Constitution by providing for cruel and unusual punishment.

B. Whether the Virginia Capital Murder statute is unconstitutional on its face and as applied to the instant case in violation of the 8th and 14th Amendments to the United States Constitution in that it provides no standards for determining the probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society.

C. Whether the Virginia Capital Murder statute is unconstitutional as applied herein to the proof that there is a probability the accused would commit criminal acts of violence that would constitute a continuing serious threat to society.

D. Whether the trial court erred in denying defendant's discovery request for criminal records of prosecution witnesses.

E. Whether the defendant was effectively denied his right to cross examine accusatory witnesses at trial.

F. Whether the jury was improperly instructed regarding the defense of alibi, by the court's denial of defendant's proferred instruction.

G. Whether the trial court denied defendant' his 6th Amendment right to represent himself at trial when defendant so requested at closing argument.

H. Whether the trial court erred in denying defendant's motion for mistrial when the Commonwealth's Attorney commented during closing argument that he did not see Mike Wade, a defense witness when the Commonwealth's Attorney had seen and talked to Mike Wade in the hallway outside the courtroom during trial.

I. Whether the trial court erred in refusing to instruct the jury in the sentencing phase of the case regarding the definition of reasonable doubt.

J. Whether Virginia's Capital Murder statute denied to defendant his right to allocution, which denied defendant's right to due process of law and and equal protection of law.

K. Whether the evidence submitted by the Commonwealth at the sentencing portion of trial was improperly admitted in that the prior sentences of defendant were allowed to be read to the jury and testimony from a prior case was allowed to be read to the jury.

L. Whether the trial court erred and denied defendant his constitutional rights, by not defining the "dangerousness" portion of the Capital Murder statute.

M. Whether Section 19.2-264.5 of the Virginia Code, limiting a trial court to set aside a jury death penalty only upon good cause shown, is unconstitutional in that it denied defendant the equal protection of the law in that the trial court for all other crimes has complete discretion to reduce or suspend or modify a jury sentencing.

STATEMENT OF FACTS

Defendant was indicted for the capital murder of Albert Lee Burwell. The indictment charged that the murder was committed during the commission of a robbery. Defendant was also charged with the use of a firearm in the commission of the murder. Trial by jury was had on June 17 thru June 20, 1980. It ended in a mistrial when the jury was unable to reach a verdict. The second trial was held on August 19 thru 22. The jury convicted defendant of capital murder and use of a firearm. On the punishment phase of the case the jury imposed the death penalty. On November 20, 1980 upon a pre-sentence report the trial court imposed the sentence of death.

Prior to trial defendant by counsel had submitted a written list of proposed voir dire questions to be put to the venire. Questions number 2, 3, 6, 7, 8, 9, 10, 11, 16, 19, 20, 21, 22, 23, 24, and 27, the Court refused to be asked. (Appendix - pg. 97).

Dr. Marcella Fierro, M.D., Deputy Chief Medical Examiner, testified she performed an autopsy on Albert Lee Burwell on November 25 and 26, 1979. She stated that the cause of death was a gunshot wound to the back. He had a total of six gunshot wounds. Some of the shots would have been fired within a foot or two of him.

Mr. Cecil Moorehead, forensic scientist in the field of firearms identification, had examined a .22 caliber revolver submitted to him on December 10, 1979 by Detective James Gaudet of the Richmond Bureau of Police. He also examined two bullets which had been submitted to him. He stated that the two bullets were fired from the .22 caliber revolver he had examined. The bullets had been supplied by him by Detective Priddy of the Henrico Police. He had also examined a third bullet. He said this one was mutilated and he could offer no positive identification of it.

Albert Lee Burwell, Sr., testified he was the father of the deceased. He said his son had worked at the Mascot service station on Fairmont Avenue in Richmond. He worked there on November 23, 1979, a Friday. He identified items offered to him as his son's pants, shoes and billfold. He said he had last seen his son about 5:00 p.m. on November 23rd.

The testimony of Wilma Smith was stipulated. She worked at the Mascot station as a bookkeeper. On November 23rd she realized at 10:30 or 11:00 p.m. that Albert Burwell was missing. She phoned Mr. Frank Crawley, the manager, and notified him. A stipulation was entered in regard to the testimony of Frank Crawley. He received a call from Ms. Smith about 11:00 p.m. He went to the station. He made an inventory of the pump Albert Burwell had been assigned. He determined that $212.00 was missing.

The testimony of Willie H. Allen was stipulated. On the morning of November 24th he was driving on Bickerstaff Road in eastern Henrico County. He saw a body in a road side ditch. He phoned the police and went back to the scene to meet them.

Officer Reese Haller of the Henrico Police testified that on November 24th at about noon he responded to Bickerstaff Road near the entrance to Oakland Village Apartments. He met Mr. Allen and then saw the body of a young black male completely nude, fifty feet to the east he found a pair of green pants, a T-shirt and a billfold.

Detective G. R. Priddy of the Henrico Police testified he collected evidence at the scene of Bickerstaff Road. He also testified he had conducted a search in a Chevrolet Monte Carlo. Attempt was made to raise fingerprints from the car, but none could be taken. No evidence was taken from the car. At the scene on Bickerstaff Road no expended cartridges were recovered.

Samuel Walker Cook, Jr., testified that he was under indictment for the murder of Albert Burwell. He said that in November of 1979 he was living in Petersburg. He said around Thanksgiving time he came to Richmond. He came with Jeanette Green and they stayed in the Eggleston Motel in Richmond. Cook admitted that he had been convicted of a felony and also of petty larceny. They had come to Richmond to buy drugs. The next morning they got on a bus going to Church Hill. He said he was not sure what day of the week this was. They saw Betty Winfield who was in a car with another woman. He said he and Jeanette waited outside some apartments while Betty went inside. They told her they wanted to

buy drugs. He said Betty then took them to defendant's house where he first met defendant. There was a woman there by the name of Demetress. He said the house was not far from 29th and Q Streets on Church Hill. He said Demetress drove them somewhere and they bought the drugs. They used the drugs in the house. They had purchased heroin. He, Betty and Jeanette shot it. Afterward a conversation took place about getting money. He said the women all left to get defendant's check. He said he and defendant remained at the house. He said defendant talked about getting another pistol and about checking a store in the country. He testified they both drove somewhere and went to a house and asked for a gun. There was none and they returned to defendant's house. He testified that earlier defendant had been cleaning a long black .22. He identified the weapon that had been introduced as the one defendant had been cleaning. The women returned, but without defendant's check. He stated that they were planning to stick up some store out in the country. He said the women said they had looked at the store and it looked good. He stated that he, defendant, Betty and Jeanette got in the car and rode out to the country. He identified the store from a photograph shown to him. He said they did not try to stick up the store because some policemen were down the street. He said the car they were riding in was a black Monte Carlo.

While in the car someone suggested they go to the Mascot station on Fairmont Avenue. They drove around the station a couple of times.

He said Betty stated they could stick up the little boy there; he had all the money. The car was parked on the next street. He said he and defendant went to the station and stood by a gas truck, but the little boy didn't come back there. They went back to the car. He said the women were told to go to the station and cause some conflict to get the boy to come to the back. He said defendant told him to sit at the steering wheel until they got back. He said defendant came back with a pistol in the back of the boy. The boy was ordered to the back seat. He said defendant then told him to drive off. They picked up Betty and then, he said, defendant started driving the car. He stated defendant drove out into the country, crossed railroad tracks, and backed into a little alley. While they were riding, he testified defendant told the boy to take off his clothes. After the car stopped, he said defendant told the boy to get out of the car and lay on the ground. He said the boy said, please, don't kill me. He stated defendant stood over the boy and shot him. He said defendant emptied the gun. Cook said he threw the empty shells out of the car. He said defendant gave the money to Betty while he was driving. Betty used the money to buy drugs.

He testified that after the shooting defendant gave the gun to Betty and told her to hide it under a dumpster near his apartment. He said they dropped Betty off and then he and defendant went to the Mascot station. They tried to buy gas at the station. They later met up with Jeanette and drove back to defendant's house. They took

Jeanette to the bus station. He said defendant was afraid Jeanette would tell about what happened, and talked of killing her. Cook said he left the house about 6:00 a.m. He got a ride to the bus station and went to Petersburg. He said he went in hiding once he got back there.

On cross-examination Cook admitted to using drugs probably every day in November, 1979. He was using both preludin and heroin. Yet he denied any drug addiction. He said he was spending $30 to $50 per day for drugs. He had been unemployed for a long period of time.

A long discussion then ensued with the jury out concerning the reason for the continuance of Mr. Cook's trial. He said his lawyer had told him it would be best if it were continued. Defendant inquired why. Over objection Cook was allowed to talk to his lawyer about this before answering the question. Defendant's motion for a mistrial was denied. The witness then said his lawyer did not give him a reason why it was better for his case to be continued. He then told the same answer to the jury - that his lawyer told him it was the best thing to do.

Cook admitted that on November 23rd he had used heroin twice. In the evening he had shot up "bam" (preludin).

He said he did not know know how much time passed from when they left the gas station until they stopped in the alley where the shooting took place.

He said he was aware that a Tyrone Jackson had been arrested and charged with capital murder of Albert Burwell. He said that he had seen Jackson together with Betty in the past.

Belinda Atkinson said that on the last weekend of November, 1979, on a Saturday, Betty Winfield, Tyrone Jackson, and Jeanette Green came to her house in Richmond. It was about 2:00 or 3:00 p.m. She purchased a gun from Winfield for $75.00. She identified it as Commonwealth's Exhibit No. 6. She put the gun under a car seat, and later gave it to her mother, Laverne Thornton. She said some time after that the Richmond Police seized the gun in a drug raid on her mother's house.

Gladys Mock testified that in November, 1979, she was living with Belinda Atkinson. On the last weekend in November, she said she saw Betty Winfield sell a gun to Atkinson and Commonwealth's Exhibit No. 6 looked like it. She said Tyrone Jackson and another girl were with Winfield.

Mrs. Laverne Thornton identified Commonwealth's Exhibit No. 6 as the gun that was seized from her house on Second Avenue in Richmond by police in December, 1979. She said that the gun had been given to her by her daughter, Belinda.

Betty Jean Winfield testified she got out of the Virginia Correctional Center for women on November 20, 1979. She went to Petersburg when she got out. She said she had been convicted of five felonies and ten moral turpitude misdemeanors. Her felony convictions included possession of heroin with intent to distribute, welfare fraud, grand larceny and shop lifting. The misdemeanors included shop lifting and prostitution. She had been addicted to heroin and has used marijuana, preludin and valium.

She stated that on the night of November 20th she saw defendant, Tyrone Jackson and someone known as Big Four. She said that fourteen years previously she had known the defendant briefly for six or eight months. She said all four of them came to Richmond. She went to defendant's home, 3000 O Street on November 22nd. She stayed there overnight. She stated that she saw "Dap" Cook and Jeanette Green on Friday, which she said was November 24th. She said they asked her if she could get them heroin. She said she could. She got it for them and they shot it up in defendant's house. She shot preludin. This was between noon and 2:00 p.m. She said later on Demetress, Jeanette and she went to Ashland to get defendant's check. Cook stayed at the apartment with defendant. They were not able to get the check and came back to the apartment. Thereafter she, Jeanette, "Dap" and defendant left. She said they went out to the country to rob a store. She said no robbery took place because there was a police car nearby. She testified that defendant came up with the idea of holding up a Moscot gas station. She said they got to the station between 11:00 p.m. and midnight. She stated that she and Jeanette were supposed to act like they were fighting to lure the attendent around the corner. She said later on Burwell went to the last bathroom, then defendant came around the corner and put a gun on him. She said she and Jeanette started to run. She said she saw defendant's car and defendant ordered her into the car. They rode

around the corner and put a gun on him. She said she and Jeanette started to run. She said she saw defendant's car and defendant ordered her into the car. They rode around for 15 or 20 minutes. Defendant told Burwell to take off his clothes. She said defendant stopped the car and made the boy lie on the ground. She stated defendant then shot him a number of times. She said there was $97.00 in the boy's wallet. She said defendant kept that money. After getting back to the apartment she stated that defendant left saying he was going to find Jeanette. He also said he was going back to the station to have an alibi if anyone said they saw his car there. She said about 30 to 45 minutes later defendant and Cook came back. Jeanette was in the car. She said about 6:00 a.m. Cook walked out of the apartment. A short while later she said she left the house. She met Tyrone Jackson. She said she told him what had happened. She told Jackson about the pistol hidden under the dumpster. They got the gun and she sold it to a woman named Belinda. She testified she called Sylvia (Demetress) Williams and told her to tell defendant she had thrown the gun in a ditch on 2nd Street. She said she later returned to the apartment to get her things. She said when she woke up there at one point defendant had a shotgun under her ear. He asked what she had said about him. She then left the place. She said while there defendant had told Demetress he had done it. She said the defendant had cut her with barb wire that day. She said she had scars from

it on her breasts and feet. The scars were shown to the jury. She also identified a piece of paper that she said she had written defendant's name and description of defendant's car and license plate. She stated that Tyrone Jackson was not involved in the robbery or murder.

She testified that when arrested she gave a statement to the police. She said she had lied in the statement. She stated that her second statement was truthful.

Upon cross-examination the witness admitted that she had left out other felony convictions. They were unlawful wounding and armed robbery.

She knew Tyrone Jackson for four or five years and they were real tight. She said she was arrested on January 8, 1980 at the parole office and charged with capital murder. She knew that in December Tyrone Jackson had been arrested and charged with capital murder in this matter. She said that defendant and Demetress had brought her to the parole office and that defendant was in the building when she was arrested. She admitted that the capital murder charge against her had been dropped and she was no longer charged with murder. She stated she was convicted as an accessory after the fact to the sale of the gun and received a 12 month jail sentence suspended for 10 years. She said she had never been charged with robbery. She admitted that she told the police she had sold the pistol because Tyrone was sick and needed a fix. She denied that she, Green, Cook and Tyrone Jackson robbed the boy for money to get drugs. She said she did not know why the boy was being robbed.

She denied that she had ever told anyone that defendant had been involved in another robbery. She said that even though she was petrified of the defendnat, she went back to his home after the shooting to get her clothes and she fell asleep.

David Phillips, a Probation and Parole officer, said he supervised Betty Winfield's parole in November, 1979. He said the first in-person contact he had with her was on January 8, 1980 in his office in Richmond.

Jeanette Green testified with the jury out that she had been charged with capital murder in this case, but the charge had been dropped. She said she had not been charged with robbery in Richmond. She was questioned concerning whether she understood she had a right to remain silent. She said she wished to talk to a lawyer. The trial court allowed her to testify without consulting counsel. This was on the basis that she had been acquited of the murder charge and she had no robbery charge in Richmond, and that such a charge would be collaterally estopped because in her murder trial the trial court concluded she had not been a participant in the robbery. She was told that she would be allowed to consult with counsel, but was told she would be held in contempt of court for each question she refused to answer. She said she did not wish to consult with her attorney. Defendant noted his objection.

In front of the jury she testified she was 23 years old and lived in Petersburg. She said she had previously been convicted of a different murder and had also been convicted of robbery.

She said she had an intimate relationship with Dap Cook. She said one night in November around Thanksgiving she and Cook spent it at the Eggleston Hotel on 2nd Street in Richmond. They were there to get drugs.

She saw Betty Winfield, who she knew, the next day. She stated that Winfield took them to a street corner and got them drugs. She said she met defendant the day after Thanksgiving at his apartment. She said a woman was there and some kids. The drugs were shot there. She went with the other two women to get defendant's check. They did not get the check and returned to defendant's. They went to a store in the country. She learned when they got near the store that they were going to rob it. Two police cars were near and no robbery took place. They next went to the gas station. She stated that defendant told her and Winfield to go there and start a fight to attract attention. Both went there, but she said she got sick and they did not start a fight.

She stated that as she sat on the ground near the bathroom to the station she saw defendant put a gun on the attendant. The women walked back to the car. She saw the boy in the back seat. She did not get in the car. She testified that about 30 minutes later she saw the car again and got in. She said she asked defendant where the boy was. She said Cook stated he was all right. Later on she said defendant said that he made him take his clothes off and walk back. Back at the apartment she testified that Winfield told her defendant had shot the boy. While it was still dark she was driven to the bus station.

She was arrested in March. She said she had seen Cook prior to her arrest. She said she knew Tyrone Jackson, but he was not involved in the offenses.

Upon cross-examination she admitted she shot preludin and drank beer the day of the robbery at the gas station she said she was drunk. She knew Tyrone Jackson through Betty Winfield. She admitted that upon her arrest she was in the Richmond City Jail with Winfield for two weeks.

Richmond Detective James Gaudet testified he received the gun which had been introduced from Detective G. C. Robinson, a Richmond vice detective, on December 10, 1979. The gun was taken to the lab.

Robinetta Wall said she had known Tyrone Jackson for three years. At one time she was his girlfriend. She said that in November or December, 1979 Jackson had a conversation with her about a robbery-murder. She said Jackson made the following statement to her:

> ". . . he told me that he had been involved in the robbery and killed a guy, but it wasn't worth the money."

Jackson told her that the guy killed was some kind of kin to his wife, Karen. She said she later told the police this statement Jackson had made to her. She stated that Jackson said he was with a guy named Bennet when it happened. The victim had been shot three or four times. She said she was aware that Jackson had done prison time for bank robbery.

On cross-examination she admitted that Jackson had told her about the robbery-murder the day after it happened. He told her the name of the boy killed and that it was the Mascot station that he robbed. He killed him in some woods.

Henrico Detective D. P. O'Keefe said Jackson, defendant, Cook, Winfield and Green had been arrested on the robbery-murder charge. He said Jackson was turned loose. He said he arrested defendant on January 8, 1980. Defendant denied any involvement in the offenses. He said he did not know Cook and was not with Winfield on the night it happened. That night he said he was at home. The basis of defendant's arrest was the statement given by Winfield. He stated that an arrest warrant for these offenses was also issued against a Nathaniel Berrnett.

The Commonwealth rested. Upon numerous grounds defendant moved to strike the Commonwealth's evidence. The motion was denied.

Defendant's first witness was his wife, Sylvia Demetress Bassett. In November, 1979 she lived with defendant and her two children. She said she met Betty Winfield at that time. She said she met her through her husband around Thanksgiving. Winfield had just gotten out of jail and was invited to stay with them for a while. She stayed with them for about a week. She said neither she nor defendant used drugs and she was not aware that Winfield was using any while she stayed with them.

On November 23rd she said about 3:00 p.m. Winfield came to the apartment with another woman and a man. She and Winfield and the other woman went to Ashland to get defendant's check, but were unable to do so

because the boss wasn't there. Winfield asked her to stop at a nearby store. The two women went in and came out with beer.

She returned home. Her husband was cooking. She said neither of them had a gun. Later on Winfield and the man and other woman left. She, defendant and the two children went to a man named Mike's house. This man had been involved in an auto accident in which her mother's car was involved. They were over his house about ten minutes that evening. They left from there and Mike's father drove them to another house where Red lived. This was in Chesterfield County. Mike knocked at the door, but no one answered. They returned to Mike's house. She, defendant and her children left and went to defendant's mother's house, 1306 Chambers Street in South Richmond. His mother and father were there as was his niece, Georgie Mason. They ate, watched television and left around 10:45 p.m. They went to her mother's house. They left shortly later and went home. Defendant did not go out again that night.

About 3:30 or 4:00 a.m. Winfield came to the apartment. It looked like she got out of a white Cadillac. When she came in the house she said she had money and showed it to Mrs. Bassett.

Mrs. Azzalee House, 2903 East Broad Street, Richmond, was the mother of Sylvia Bassett. She said that on the night after Thanksgiving her daughter, her children and defendant had come to her home about 11:00 p.m. Her car, a 1970 Olds had been damaged in an accident. The key to her car was brought back to her then by her daughter.

Mrs. Carrie Bassett, defendant's mother, lived at 1306 Chamber Street in Richmond. She said that in November, 1979, she was undergoing treatment for cancer. She said during that period of time her son visited her every day. Her husband was also ill during this time. Her son on his visits would do whatever work needed to be done at her house. She said that on the day after Thanksgiving her son came by the house. Her granddaughter, Georgie Mason was also at the house. She thought on Thanksgiving day that Betty Winfield had been with her son when he came to the house. On the next night her son came with Sylvia, Betty and the two children.

Georgianne Mason, age 23, was defendant's niece. She saw defendant on Thanksgiving Day. She said it was about 5:00 or 6:00 p.m. when he came to his parent's house. Betty Winfield was with him. She saw him the next night at the house. With him were Sylvia and the two children. She said they came in a little after 9:00 p.m. and stayed a couple of hours. She timed there arrival because the Dukes of Hazzard was on television. She stated that they stayed a couple of hours.

She said that at the time she was taking an English course at J. Sergeant Reynolds Community College where she was required to keep a daily journal. She had turned the journal in or January 22, 1980. She got it back this date at 11:00 a.m. For November 23rd she

had an entry. It said that Herbert and his family came over to the house that night.

Defendant, age 35, testified he did not rob nor kill Albert Lee Burwell. In November 1979 he was employed at Professional Coatings National doing spray painting and sand blasting. He was an assistant foreman. He was paid $320.00 per week.

He knew Betty Winfield but had not seen her for four or five years before November, 1979. He said he did not use drugs then and had never used drugs. He had neither a gun nor barbed wire in his house. He owned no gun.

He saw Betty Winfield the night of November 20, 1979. She was lying in a street gutter throwing up. He took her to Tyrone Jackson's house. She came to his house on Thanksgiving Day. Sylvia agreed with him that they would let her stay with them for a while. On the Friday after Thanksgiving she brought two persons to the house. He did not know either of them. They were Sam Cook and Jeanette Green. All of them with Sylvia's children went to pick up his check on Friday. Cook stayed at the house. He said Cook left and when he came back asked to use the bathroom. Sylvia came back and said she did not get the check because she missed the foreman. Betty asked him for $50.00. He did not give her the $50.00. Winfield, Cook and Green then left the house.

He said that they did not return that night. When he woke up the next morning Winfield was in the house asleep. She left that day and returned the next day. He said that Sylvia told him that Winfield had

been using drugs in the house. He said he told her she was not to use drugs in the house. He said she made some kind of sarcastic comment and he knocked her down.

Sylvia recieved a phone call on January 2nd from Winfield's parole officer. She had until 1:00 p.m. to report. They went and found her and brought her to the parole office. While he was there he went to say hello to his parole officer. Winfield was arrested there. He and Sylvia left and went home. They went grocery shopping that afternoon and returned home. He was arrested there that afternoon. He said that he was questioned by Officer O'Keefe. He denied committing the robbery and murder. He said he was shown two photographs.

He said he had never cut Winfield with barbed wire. He had never threatened to kill Winfield or Green.

He said on the evening of November 23rd after Cook, Green and Winfield had left the house, he and Sylvia and the children in two different cars, his and her mother's, went over to Snead Road in South Richmond. They were going to see a man named Mike who had been in the auto accident which damaged the auto of Sylvia's mother. When they got there Mike's father drove with him out to Chesterfield County. They knocked on a door, but no one answered. After that they went to his mother's house. His mother and father were there as were Georgie and her children. His mother was in bed. He thought they were there about an hour or an hour and a half. From there they

went to Sylvia's mother's house to drop the car off. They then went home and he did not go out again that night.

Upon cross-examination he said on the Tuesday before Thanksgiving he had been in Petersburg. He was with Tyrone Jackson, Buck Ford and Clay Ford. He had known Jackson for three or four years. He saw Winfield that night about 10:30 or 11:00 p.m. It was stipulated that he had been convicted of three felonies.

A rebuttal witness, Jill Vaughan, was called by the Commonwealth. She was an English instructor at J. Sergeant Reynolds. She had Georgianne Mason as a student there. She was a student of her's in April, 1980. She said she never saw her before April, 1980.

After the conclusion of the Commonwealth Attorney's closing argument defendant moved for a mistrial. He had stated that he had not seen Mike Wade to the jury. The man had been in the hallway outside the courtroom. It was argued this was a personal comment rather than arguing the failure to call a witness. The motion was overruled.

The jury returned a verdict of capital murder. Thereafter under the bifurcated hearing system an evidentiary hearing was had on the issue of punishment.

A Department of Corrections witness, Corbin Cash, said their records showed defendant was convicted in 1963 in the Circuit Court of the City of Richmond of unlawful wounding. Over defense objection he testified defendant received 12 month sentence. There was a 1965

statutory burglary conviction in Hanover County for which there was a nine month sentence. In 1966 a conviction for being an accessory after the fact to breaking and entering for which he received 12 months. In 1967 a robbery conviction from Petersburg and a 99 year sentence. An escape conviction from Petersburg and a six month sentence. He was released on parole May 25, 1979.

Over defense objection the Commonweath read into evidence a portion of the transcript of the Petersburg robbery trial of defendant. The victim therein said defendant made him lie down at the motel where he worked as night auditor. He said he was shot by defendant in the arm and also a second shot into his back.

Willie Ezell, a probation officer, was called as a defense witness. He was defendant's probation officer. Defendant was under his supervision from May 25, 1979 until January 8, 1980. He said defendant made a good adjustment. There were no violations of parole and defendant had reported to him all the items he was required to.

James Turner, Henrico County Sheriff, testified that since January 8th when defendant had been placed in his jail he had caused no disciplinary problems.

At the conclusion of the Commonwealth's closing argument, defendant moved by counsel to be allowed to make closing argument himself. Counsel noted it had advised defendant against this. The Commonwealth objected. (App-667). The trial court denied the motion (App-669).

The jury imposed the death penalty after consideration of his past criminal record that there was a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society (App-693). A presentence report was ordered.

Hearing on the presentence report and the sentencing was held on November 17, 19, & 20, 1980. Defendant with his counsel examined witnesses. Defendant made the argument to the trial court.

Karen Murphy a Probation and Parole Officer, testified she prepared the presentence report.

D. P. Williams, Jr., a Henrico County Deputy Sheriff, testified that on August 22, 1980, about 7:20 or 7:30 p.m. while he was in the booking section of the jail he heard defendant while defendant was on the telephone. Over defense objection he said he heard defendant say - not to cry and not to worry that he killed the boy and the jury gave him what he deserved. (App-767). He said Deputy Theresa Williams was also present at that time. He made no notes of what he claimed defendant had said. He made no mention of it in his daily report.

Theresa Williams, a deputy, said she worked in the jail on August 22, 1980. She was in the booking section after 6:00 p.m. She said she saw defendant make a phone call. She said she heard defendant tell Sgt. Ross he wanted to contact his wife. She said defendant said on the telephone - not to worry, that he did it and

got what he deserved. She said she informed Sgt. Ross what she heard, but did not make any notes. She said defendant made four or five phone calls.

Demetress Bassett, defendant's wife, testified she received a phone call from defendant around 7:00 p.m. on August 22, 1980. She said defendant told her not to worry, that he didn't do it. In response she said to him - I know you didn't. (App-793).

Defendant testified he denied killing or robbing Albert Lee Burwell.

Robert Seay, Henrico deputy, said on August 22nd in the evening at the jail different people in the booking section said defendant was guilty of the crime.

Evelyn Ross, was employed at the County Jail in August, 1980, as a shift commander. She gave defendant permission to make a phone call after court on August 22nd. She said she heard bits and pieces of his phone call with his wife. She said no incidents were reported to her about any statements defendant made that evening.

Argument was made to the Court on sentencing. The Commonwealth wavied opening. Defendant argued himself.

The trial court in rendering its decision noted it was mindful of defendant's record, the psychological report and the similarity between the instant case and defendant's prior robbery conviction in Petersburg. (App-947). It concluded the probability of this (robbery - shooting) happening again appeared to be very great. The

trial court finished its remarks before giving defendant the opportunity for his allocution rights as follows:

> "This Court gives great weight to what a jury does, what a jury says. And unless it's clearly wrong or there's some technicality involved, there's no reasons for this Court, and I think this is what the law is, for this Court to overturn a jury verdict." (App-948-949).

The trial court then imposed the sentence of death.

REASONS FOR GRANTING THE WRIT

A unique circumstance in this matter, as can be gleaned from a reading of the facts, is that petitioner was convicted of capital murder and sentenced to death with no corroboration of the testimony of the accomplices. No physical evidence nor any testimony of a disinterested witness linked petitioner to the murder. The constitutional issues raised herein with regard to the liability trial and the punishment proceeding must be viewed from the perspective of a man being sentenced to death solely on the believed testimony of accomplices. As noted the first jury was not able to reach a verdict and a mistrial was declared. The spectre of a person being electrocuted by the government based upon the self-serving testimony of drug addict criminals must be borne in mind when the issues regarding the trials are considered. Of the issues raised herein, petitioner sets out his argument on those most closely linked with that

evidentiary situation.

Denial of the right to cross-examine the prosecution's main accusatory witness.

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." By the Fourteenth Amendment the right is secured for defendants in state as well as federal criminal prceedings, Pointer v. Texas, 380 U.S. 400 (1965), and focuses primarily on the right to cross-examine accusatory witnesses, Douglas v. Alabama, 380 U.S. 415 (1965). The petitioner herein asserts that he was denied the right of effective cross-examination when the Commonwealth's witness, Samuel Cook, was permitted to confer with his attorney before answering his counsel's question. Because cross-examination is so vital for demonstrating the bias, the motives or the untrustworthiness of a witness, the halting of the trial and the excusing of the jury while the witness conferred with his counsel completely curtailed any effective opportunity for poignant cross-examination.

In Davis v. Alaska, 415 U.S. 308 (1974) this Court reversed the conviction on the ground that defense counsel had been denied the right of effective cross-examination. In Davis, supra, the defendant was precluded from asking the prosecution's crucial witness whether he was on probation for burglary. With this line of

questioning, defense counsel sought to demonstrate that the prosecuting witness' identification of the defendant as the culprit was motivated out of the witness' concern in protecting his probationary status. 415 U.S. at 311.

As in Davis, supra, petitioner's counsel herein sought to disclose on cross-examination for the purpose of impeachment, the fact that Cook's trial was always postponed to a date after the petitioner's trial and that the witness understood the delay inured to his benefit. This line of questioning would have permitted counsel to argue to the jury that the witness had an interest in testifying against the petitioner because of the possibility of leniency should his testimony assist in a conviction. Additionally, although the witness eventually did answer the question, the threshold issue here is what would have the witness's response have been had he not conferred with counsel. As a result, pursuant to Davis, supra, Smith v. Illinois, 390 U.S. 129 (1968), and Brookhart v. Janis, 384 U.S. 1 (1965), petitioner claims that this denial of his right to effective cross-examination constituted a "constitutional error of the first magnitude and no amount of showing of want of prejudice (will) cure it." 415 U.S. at 318 citing Brookhart, supra at 3.

This error is of even greater moment because this court of record was under no obligation to protect the witness from being discredited on cross-examination, "short of an attempted invasion of his constitutional protection from self-incrimination,

properly invoked." Alford v. United States, 282 U.S. 687 (1931). Moreover, petitioner maintains, since any considerations regarding the nonconstitutional protection of an accusatory witness must yield to the Sixth Amendment's confrontation right, see Chambers v. Mississippi, 410 U.S. 284 (1973), Smith v. Illinois, supra, the trial court's action in permitting the attorney conference compounded the constitutional error. For these reasons the petitioner asserts that he was denied his constitutional right to effective cross-examination, as guaranteed by the Sixth Amendment and that his motion for a mistrial was improperly overruled.

Unconstitutional jury instruction on alibi defense.

At the close of the evidence, the trial court granted the following instructions:

> The defendant relies upon the defense that he was not present at the time and place the alleged offense was committed. If, after consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time and place the alleged offense was committed, you shall find him not guilty. (Virginia Model Jury Instructions, Alibi (1980)).

This instruction, standing alone, misled and confused the jury. Petitioner does not dispute that when he relies upon alibi, the burden is upon him to go forward with the evidence to create a reasonable doubt concerning his presence at the time and place of the offense. Thompson v. Commonwealth, 88

Va. 45, 13 S.E. 304 (1891). However, an instruction like the one above, must be supplemented by defining instructions in order to comport with constitutional requirements. Cf. Mullaney v. Wilbur, 421 U.S. 684 (1975); Hodge v. Commonwealth, 217 Va. 338 (1976). According to Fenner v. Commonwealth, 152 Va. 1014, 148 S.E. 821 and Fout v. Commonwealth, 199 Va. 184, 194, 98 S.E. 2d 817 (1957), the defendant is entitled to an instruction that he need not prove the alibi beyond a reasonable doubt nor by a preponderance of the evidence. The burden incumbent upon him is only to proffer evidence, which, when considered with the whole, creates a reasonable doubt regarding his guilt. Fenner, supra. See 1 V.J.I. §106.02 (1974). Accord, Lear v. Commonwealth, 195 Va. 187, 77 S.E. 2d 424 (1953).

The record in this case reveals no such burden-clarifying instruction was given to the jury. Consequently, the jury had no guidance for weighing petitioner's evidence against the Commonwealth's. Indeed, absent clarification, the jury may have believed that it was the defendant's burden to prove beyond a reasonable doubt that he was not present at the time and place of the offense. See In re Winship, 397 U.S. 358 (1970) (The prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. Id. at 364.) To confer upon the jury the unrestrained latitute to speculate regarding the relative degree of proof required for substantionally fundamental that only the reversal remedy will satisfy the need to

vindicate a defendant's due process rights. Mullaney, supra, 421 U.S. at 690.

Petitioner notes specifically that the instruction stated that he "relies" upon the defense of alibi. The instruction is constitutionally infirm because as written, it shifts the burden upon him to prove he was not present at the time and place of the offense. This contravenes the principle set forth in In re Winship, supra, as construed in Mullaney, supra, 421 U.S. at 687 whereby the Commonwealth may not shift to the defendant the burden of proving any essential element of the offense charged. Because the prosecution is required to prove the presence of the defendant beyond a reasonable doubt as an essential element of the offense charged, it may not constitutionally require the defendant to prove he was not present. Mullaney, supra.

The facts of this case makes the violation herein particularly eggregious since the alibi instruction given was not supplemented by a burden of proof instruction informing the jury the extent to which the defendant must prove the defense. For comparison petitioner cites the alibi instruction set forth in 1 V.J.I. §106.02 (1974):

> Where the Commonwealth has established a prima facie case and the defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt nor by a preponderance of the evidence but by such evidence and to such a degree of certainty as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilt of the defendant. (emphasis added)

The instruction above may withstand constitutional challenge since it defines the extent of the burden on the defendant but expressly instructs the jury that he must prove the alibi by less than a reasonable doubt. Absent this qualifying language, the Virginia Model Jury Instruction, supra, standing alone, shifts the burden to the defendant to prove his absence, see Mullaney v. Wilbur, supra, without instructing the jury that the proof required is not that which is beyond a reasonable doubt nor by a preponderance of the evidence; the burden on the defendant is only the level of proof which will cultivate a reasonable doubt in their minds Therefore, the instruction thus framed, violated petitioner's due process rights.

Petitioner was denied the right to represent himself.

At the sentencing portion of the trial petitioner demanded his right to present the closing argument to the jury before the jury retired to determine whether to impose the death sentence. The court overruled the motion to proceed in propria persona and also overruled his motion for a mistrial. The court's action denied him his constitutional right under the Sixth and Fourteenth Amendments to argue for his life before the sentencing authority, Va. Code §19.2-264.4(c).

In the watershed case of Faretta v. California, 422 U.S. 806 (1975), this court held that over the objection of the defendant the trial court cannot constitutionally require the

case be conducted by counsel. Id. at 837. Relying on Adams v. United States, 317 U.S. 269, (1942), the Court recognized that the Sixth Amendment right to the assistance of counsel implicitly embodies the "correlative right to dispense with a lawyer's help." Id. at 279.

Importantly, the affirmative right to self-representation was expressed thusly:

> The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalims. They rest on considerations that go to the substance of an accused's position before the law.
>
> What were contrived as protections for the accused should not be turned into fetters . . . to deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalism.
>
> When the law administraction of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of the accused, to deny him in the exercise of his free choice to dispense imprison a man in his privileges and call it the Constitution. Id. at 279-80 (emphasis added).

Similarly, when the Court ruled in Snyder v. Massachusetts, 291 U.S. 97 (1934), that the presence of the accused is required at all stages of the proceedings where fundamental fairness would be thwarted by his absence, the ratio decidendi was expressed as:

> the defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself, Id. at 106. (emphasis added).

Furthermore, the right of the accused to conduct his defense in propria persona has been recognized by numerous federal appellate courts; United States v. Plattner, 330 F.2d 271 (2d Cir. 1964); MacKenna v. Ellis, 263 F.2d. 35 (5th Cir.), cert. denied, 300 U.S. 935 (1957); United States v. Sternman, 415 F.2d. 1165 (6th Cir. 1969); cert. denied, 397 U.S. 907 (1970); Lowe v. United States, 418 F.2d 100 (7th Cir. 1969), cert. denied, 397 U.S. 1048 (1974); United States v. Warner, 428 F.2d. 730 (8th Cir.) cert. denied, 400 U.S. 930 (1970); Haslam v. United States, 431 F.2d. 362 (9th Cir. 1970), cert. denied, 402 U.S. 976 (1971). See Fed. Rule Crim. Pro. 44.

As a matter of constitutional criminal procedure, the petitioner maintains that "the Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, supra at 819. Consequently, herein, the Sixth Amendment's guarantee to the "assistance of counsel" is clear; counsel is the defendant's "assistant" and no more. See Id. at 820. When the accused demanded to make closing argument himself, the trial court committed constitutional error in refusing to permit him to plead in propria persona. The prejudice resulting from this refusal is particularly compelling since he was on trial for his very life.

Because the accused in a capital murder jury trial has no statutory opportunity to address personally the sentencer, the court's refusal compounded the constitutional infirmity already suffered by Virginia's capital sentencing procedure. Hence, it is maintained, that he was denied his constitutional right to plead his case before the jury who were ultimately charged with the duty to sentence him to live or to die.

Unconstitutional jury instruction in the punishment trial.

An error of constitutional statute occurred at the guilt stage of the proceeding when the court denied his instruction defining reasonable doubt as used in §19.2-264.4(c) of the Virginia Code. In Gregg, supra, this court recognized that death as a punishment is "unique in its severity and irrevocability," 428 U.S. at 187. Gardner v. Florida, 430 U.S. 349 (1977). Five Justices of the Court now expressly concede this notion, Gregg v. Georgia, 428 U.S. 153, 181-188 (1976) (opinion of Steward, Powell and Stevens, JJ.); id. at 231 241 (Marshall, J. dissenting); Furman v. Georgia, 408 U.S. 238, 286-291 (Brennan, J. concurring); id. at 314-371 (Marshall J., concurring). Because the accused's life hangs in the balance, this court has been particularly sensitive in capital cases "to insure that every safeguard is observed." Gregg, supra at 187. This concern became a constitutional mandate in Gardner v. Florida, 430 U.S. 349 (1977) wherein the Court delineated that in capital cases:

> the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particuarl result of the sentencing process. 430 U.S. at 358 citing Witherspoon v. Illinois, 391 U.S. 510, 521-523 (1968)

As noted, simply because the Due Process Clause applies, that does not of itself attach the entire panoply of criminal trial procedureal rights. See 430 U.S. 358 at n. 9. Indeed, once the Court has ordained the applicability of due process guarantees, the ultimate question concerning what process is due must be resolved. Petitioner maintains, however, that in capital case, every reasonable and legitimate procedureal protection must be accorded him.

Since the court in Gardner, supra, recognized that the sentencing process is as critical a stage of the proceedings as the trial itself, this court cannot, and should not assume that the administering of a reasonable doubt instruction at the guilt phase cured the constitutional infirmity. Indeed, 19.2-264.4(c) requires a defining instruction since the nature of the burden imposed upon the Commonwealth is a predicate to a capital sentence. According to the statute, "the Commonwealth shall prove beyond a reasonable doubt" one of two aggravating circumstances. Thus the statute makes it incumbent on the Commonwealth to carry the criminal burden of proof as an essential element of a capital verdict. In this manner the standard of proof itself

is analogous to the Commonwealth's burden of proving every element of an offense charged. McGhee v. Commonwealth, 219 Va. 560, 248 S.E.2d 808 (1978). See Mullaney v. Wilbur, supra. Cf. Jackson v. Virginia, 443 U.S. 307 (1979).

This analysis read in conjunction with Godfrey, supra., requires a new trial here. In Godfrey, supra., the court reversed the petitioner's capital sentences because the trial court's failure to instruct as to the meaning of subsection (b)(7) of Georgia's death penalty statute. In the same manner, this Court must set aside the capital sentence for the failure of the trial court to adequately instruct the jury regarding the burden on the Commonwealth at this stage of the capital sentencing procedure.

Unconstitutional denial of the right to allocution.

The petitioner asserts that after Gardner v. Florida, supra. as a matter of constitutional law, he is entitled to due process protection at the sentencing phase of the trial. Id. at 358. In Gardner, supra, the Court expressly recognized that the sentencing phase as well as the trial phase in capital cases must meet the requirements of the Due Process Clause. 430 U.S. at 358. Here it is contended that as part of the process due, he is entitled to the right of allocution, before the jury, prior to their retiring to deliberate whether he should live or die.

As a matter of constitutional principle, the Supreme Court in Green v. United States, 365 U.S. 301 (1961), noted that the right of the defendant to speak in his own behalf is based upon the ancient common-law right allocution, id. at 304 citing Anonymous, 3 Mod 265, 266, 87 Eng. Rep. 175 (K.B. 1689) and the Court reaffirmed the right of the defendant to make a statement to the court prior to pronouncement of sentence. Fed. Rule Crim. Pro. 32(a) ("Before imposing sentence the court . . . shall address the defendant personally and ask him if he wishes to make a statement in his own behalf . . .") (emphasis added). Similarly, Va. Code §19.2-293 provides that prior to pronouncing sentence, "the Court shall inquire of the accused if he desires to make a statement . . ." (emphasis added). See Sup. Ct. Rule 3A:25(b) and 3A:25A.

In Green, supra, the Court opined:

> None of these modern innovations lessens the need for the defendant, presonally, to have the opportunity to present to the Court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself, 365 U.S. at 304.

Petitioner claims that this constitutional mandate applies with even greater force in capital proceedings. Since in capital cases tried before a jury, only the jury can sentence him to die, i.e. the judge may only reduce the sentence to life, but may not

increase the penalty to death, Va. Code §19.2-264.5, the only effective opportunity the defendant has to plead for his life is prior to their deliberations. Therefore this Court cannot countenance with constitutional approval a procedure whereby a defendant is effectively denied his right to allocution prior to a determination of his sentence.

Petitioner asserts that with respect to his right to allocution, Virginia's capital sentencing procedure is facially unconstitutional as violative of the Equal Protections Cause. The statutory sheme adopted in this state, Va. Code §19.2-264.2 - - 19.2.264.5 treats capital defendants and their right to allocution differently depending on whether a trial is had by judge or by jury. When a capital trial is by judge, the bench determines the issue of guilt and if conviced of the defendant's guilt, hears evidence prior to ascertaining punishment. Va. Code §19.2-295 (Cum. Supp. 1980).

At this time, prior to pronouncement of sentence, the defendant is given an opporunity to plead for his life. Thus, the defendant in a bench trial clearly is given an opportunity for allocuation prior to a determination of whether he is to live or die. See Green v. United States, supra.

Unlike a bench trial, however, a capital defendant before a jury, is given no opportunity for allocution to the trier of fact until after the jury has deliberated. Once the jury returns a

sentence of death, the defendant is left only with the opportunity of persuading the judge during allocution to set aside the sentence of death and impose a life term. See Va. Code §19.2-264.5. Hence, the defendant in a bench trial is granted an opportunity to plead directly to the trier of fact for his life prior to sentencing while a defendant in a jury trial is afforded no opportunity to plead to the trier of fact for his life until after he has been sentenced to die. In the former situation, the capital defendant's statement may persuade the sentencer to spare his life; in the latter situation, the defendant must persuade the sentencer to spare his life. Because a capital defendant's right to allocution occurs at different states of the sentencing procedure depending on whether the trial is before a judge or a jury, and since this right to allocution bears a substantial impact on the burden of persuasion the defendant must carry if he is to keep his life, Virginia's sentencing scheme violates the Due Process and Equal Protections Clauses of the United States Constitution.

Alternatively, regardless of the actual procedure whereby a death sentence is imposed it cannot be disputed that the Virginia sentencing procedure does not provide the capital defendant in a jury trial with a statutory opporunity to address directly the trier of fact who sentenced him to die. In a bench trial, however, at some point in the proceedings, the capital defendant will have

an opportunity to address the sentencing authority. Va. Code 19.2-298. As a result of this differing treatment, the defendant seeks the shelter of the Equal Protections Clause to vindicate his rights.

Lastly, the petitioner maintains that if the Court should overrule the argument set above, the Court should declare Virginia's capital sentencing procedure, Va. Code §19.2-264.5 as unconstitutionally vague for failing to adequately provide that capital defendants have an equal procedural as well as substantive opportunity for allocution.

CONCLUSION

It is respectfully submitted that the conviction of capital murder and the imposition of the death penalty in the Henrico County, Virginia Circuit Court are constitutionally infirm and the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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